

TURNER BROTHERS, INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-337

Decided June 3, 1988

Appeal from a decision of Administrative Law Judge Frederick A. Miller affirming the issuance of Notice of Violation No. 84-3-4-7 (1 of 3). TU 5-11-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: State Program: Generally

Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 521(b) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1271(b) (1982).

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally

OSMRE makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When OSMRE's prima facie case that the operator failed to return all disturbed areas to their approximate original contour is un rebutted, the violation will be sustained on appeal.

APPEARANCES: Mark Secrest, Esq., Muskogee, Oklahoma, for appellant; Nell Fickie, Esq., Department Counsel, Office of the Regional Solicitor, Tulsa, Oklahoma, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Turner Brothers, Inc., has appealed the decision of Administrative Law Judge Frederick A. Miller, dated January 21, 1986, affirming issuance of Notice of Violation (NOV) No. 84-3-4-7 (1 of 3) by the Office of Surface

Mining Reclamation and Enforcement (OSMRE) for failure to return all disturbed areas to their approximate original contour, citing 30 CFR 936.17 and Oklahoma Permanent Regulatory Program Regulation (OPRPR) | 816.101(b)(1) and (2). 1/

OSMRE issued the challenged NOV on October 18, 1984, citing Turner Brothers for "failure to return all disturbed areas to their approximate original contour," in violation of 30 CFR 936.17 and OPRPR | 816.101(b)(1) and (2). OSMRE required that Turner Brothers take the following corrective action by November 27, 1984:

Return equipment to the mine site and begin operations to restore prior land use capability. Such operations to include but not be limited to grading to achieve approximate original contour. Reshaping of graded area to eliminate depressions. Redistributing of topsoil, elimination of rills and gullies, addition of soil amendments and reseeded in accordance with approved mining plan.

On November 13, 1984, Turner Brothers filed an application for review of the NOV, arguing that it "has returned the area to its approximate original contour and is not in violation of any of the applicable statutes or regulations, in relation to NOV 84-03-004-007 (1 of 3)." An evidentiary hearing was held before Judge Miller on September 17, 1985, in Tulsa, Oklahoma. In his January 21, 1986, decision, Judge Miller affirmed the issuance of NOV No. 84-3-4-7 (1 of 3), ruling that OSMRE had established an un rebutted prima facie case that Turner Brothers "failed to properly backfill, compact, and regrade the backfilled material" in violation of OPRPR | 816.101(b)(1) and (2).

In its statement of reasons (SOR), Turner Brothers argues that Judge Miller erred in finding that OSMRE had jurisdiction to issue the NOV. According to Turner Brothers, OSMRE lacked jurisdiction to issue the NOV because when OSMRE assumed primary enforcement jurisdiction of surface coal mining operations in Oklahoma, it did not allow for proper notice under the Administrative Procedure Act (APA), 5 U.S.C. | 553(d) (1982). Turner Brothers argues that the Secretary's publication in the Federal Register of notice of its decision to assume primary enforcement jurisdiction over Oklahoma's surface mining program on April 12, 1984, with a stated effective date of April 30, 1984, violated the APA, which requires a hiatus of 30 days between the publication date and the effective date of a "rule." Therefore, in Turner Brothers' opinion, the Federal takeover of Oklahoma's surface mining regulatory program was void, leaving OSMRE without authority to issue the NOV and the Office of Hearings and Appeals without jurisdiction to review its propriety.

1/ In his Jan. 21, 1986, decision, Judge Miller also affirmed Violations 2 and 3 of NOV No. 84-3-4-7, issued for failure to maintain all diversions in accordance with OPRPR | 816.43, and because the water discharged off the permit area violated the pH range specified by OPRPR | 816.42(b), respectively. Turner Brothers appealed only that portion of Judge Miller's decision which affirmed Violation 1 of NOV No. 84-3-4-7.

OSMRE responds that section 526(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1276 (a)(1) (1982), "provides the exclusive avenue for judicial review of the Secretary's state program actions." Section 526(a)(1) of SMCRA states:

Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this chapter shall be subject to judicial review of the United States District Court for the District which includes the capital of the State whose program is at issue. * * * Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

OSMRE argues that Turner Brothers failed to object properly to OSMRE's institution of direct enforcement of Oklahoma's State program. According to OSMRE, Turner Brothers must have objected to OSMRE's action by filing an action for judicial review within 60 days of April 12, 1984, the date on which OSMRE's direct enforcement was announced, and such action must have been filed in the U.S. District Court for the Western District of Oklahoma, the forum with jurisdiction to review the Secretary's action (Brief at 4-5).

Judge Miller agreed with OSMRE's interpretation and application of section 526(a)(1) of SMCRA.
2/ Judge Miller reached the same conclusion

2/ Section 521(b) of SMCRA provides as follows:

"Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall after public notice and notice to the State, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfied the Secretary that it will enforce this chapter, the Secretary shall enforce, in the manner provided by this chapter, any permit condition required under this chapter, shall issue new or revised permits in accordance with requirements of this chapter, and may issue such notices and orders as are necessary for compliance therewith: Provided, That in the case of a State permittee who has met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the permittee a

in several other decisions which have been reviewed by this Board. In Turner Brothers, Inc. v. OSMRE, 100 IBLA 365 (1988); Turner Brothers, Inc. v. OSMRE, 99 IBLA 349 (1987); Turner Brothers, Inc. v. OSMRE, 93 IBLA 194 (1986); and Turner Brothers, Inc. v. OSMRE, 92 IBLA 381 (1986), the Board noted that the State of Oklahoma had unsuccessfully raised this jurisdiction issue in State of Oklahoma v. Hodel, No. 84-1202-A (D.C.W.D. Okla., Dec. 3, 1985), wherein the district court ruled that "the self-contained administrative procedures in SMCRA govern this case, overriding [the] APA." The district court decided that the notice published by OSMRE in the Federal Register on April 12, 1984 (49 FR 14674), "complied in full with the provisions of the SMCRA, specifically with 30 U.S.C. | 1271(b)."

As in the previous Turner Brothers cases, cited above, we affirm Judge Miller's dismissal of Turner Brothers' challenge to OSMRE's jurisdiction to issue the NOV involved herein, and the jurisdiction of the Office of Hearings and Appeals to review the propriety of OSMRE's issuance of that NOV, as being raised in the wrong forum in an untimely manner.

[2] In addition, Turner Brothers challenges Judge Miller's decision on the basis that OSMRE failed to present sufficient evidence to establish a prima facie case of a violation of OPRPR | 816.101(b)(1) and (2). That regulation provides as follows:

(b) Method for backfilling and grading.

(1) Except as specifically exempted, all disturbed areas shall be returned to their approximate original contour. All spoil shall be transported, backfilled, compacted--where advisable to insure stability or to prevent leaching--and graded to eliminate all highwalls, spoil piles, and depressions.

(2) Backfilled material shall be placed to minimize adverse effects on ground water, minimize off-site effects, and to support the approved postmining land use.

OSMRE contends that the following evidence, as summarized by Judge Miller, establishes a prima facie case that Turner Brothers violated OPRPR | 816.101(b)(1) and (2):

The owner of the property, Mr. [Ronald R.] Martin, testified to the pre-mining condition of this land. His testimony was that there was a field of approximately 155 acres. According to Mr. Martin the field was open with good drainage and no ditches to have to drive around which made for more efficient farming before it was mined (Tr. 59). Mr. Martin described the pre-mining drainage as breaking along the watershed line in the middle of Section 15 (Tr. 59-60). The water east of the watershed line

fn. 2 (continued)

reasonable time to conform ongoing surface mining and reclamation to the requirements of this chapter before suspending or revoking the State permit."

flowed east to the grassy waterway and the water west of the watershed line flowed west and off the field (Tr. 60). The drainage was such that Mr. Martin would not find standing water in the field, even after heavy rains (Tr. 61). Inspector Swart corroborated Mr. Martin's description by use of the permit map submitted by TBI [Turner Brothers]. Inspector Swart testified that the pre-mining map showed no depressions on the permit area (Tr. 25).

OSM performed a complete inspection of this permit on October 16 and 17, 1984. Coal had not been extracted from this permit since June 1984 (Tr. 94) and the area relevant to this violation was backfilled, regraded and topsoiled (Tr. 21). TBI had planted a temporary vegetation of haygrazer in June (Tr. 95). Inspector Swart testified, and photographs entered into evidence showed, that there were several water-filled depressions on permit 83/85-4100 on October 16 and 17, 1984 (Tr. 24-25, 27, 29-31; Exh. R-3 through R-8). These areas were described as being generally on the southern boundary of the permit in Section 15, the southeast corner of Section 15 and various water-filled depressions in Section 14 (Tr. R-5 and R-6). Inspector Swart also testified about the lack of adequate drainage on the permit (Tr. 29). One major drainage problem was in the southeast corner of Section 15 where the placement of the spoil had caused a damming effect that backed up water to points off of the permit area (Tr. 30).

Mr. [Romer] Gronbeck made an on-site inspection of this permit in March of 1985 (Tr. 77-78). Mr. Gronbeck's expertise was sought to aid in determining the technical problems in the regrading of permit 83/85-4100 (Tr. 74). During his on-site inspection, he saw several areas of ponded water and the south-east corner of Section 15 which had been so poorly backfilled and regraded that large areas of land were flooded as a result of this damming effect (Tr. 77). Mr. Gronbeck determined that the area in permit 83/85-4100 was not restored to the approximate original contour (Tr. 79).

Mr. Martin's testimony about the land in October of 1984 was similar to Inspector Swart's and Mr. Gronbeck's. Mr. Martin recognized the water-filled depressions pictured in Exhibits R-3, R-4 and R-7 and testified that these "duck ponds" were not present prior to the mining (Tr. 61-62). Mr. Martin testified that in his opinion, the land in permit 83/85-4100 was not capable of producing the same quantity and quality of crops after TBI's reclamation as it was before it was mined (Tr. 63). The testimony presented at the hearing was that the post-mining contour of the land would trap the tractor that had been used prior to mining (Tr. 63), that the standing water would kill the type of crops that had been grown pre-mining (Tr. 63), and that the drainage was not as good as the pre-mining drainage (Tr. 63).

(Decision at 3-4).

Turner Brothers asserts that a "recent rain had occurred prior to [Inspector Swart's] inspection, and that it had been a very wet fall (Tr. p. 50)" (SOR at 5). In Turner Brothers' view, "[w]hat obviously occurred was some settling of the ground following the topsoiling which created the so called depression when a rain event followed. * * * [W]hen an inspector visits a recently topsoiled area following a rain event, he will usually find depressions" (SOR at 5). Judge Miller pointed out the inconsistency in Turner Brothers' position that although depressions are nearly impossible to spot until after a precipitation event, it was unreasonable for Inspector Swart to issue the NOV based upon an inspection occurring after a precipitation event. We agree with Judge Miller's conclusion that "[t]o accept this reasoning would be to prohibit the inspector from issuing a notice of violation for depressions simply because it was written at the only time when those depressions were discoverable" (Decision at 5).

We affirm Judge Miller's ruling that OSMRE submitted sufficient evidence to establish a prima facie case that Turner Brothers violated OPRPR | 816.101(b)(1) and (2). Turner Brothers failed to rebut OSMRE's prima facie case. See James Moore, 1 IBSMA 216, 86 I.D. 369 (1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Miller is affirmed.

John H. Kelly
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Will A. Irwin
Administrative Judge

